79-1196

Supreme Court, U.S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

No.

Annie Mary Timmons,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Annie Mary Timmons
3104 Monroe Street
Columbia, SC 29205

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In The
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No. 78-1827

Annie Mary Timmons,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

Petition For A Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

The Petitioner prays for issuance of a Writ of Certiorari to review the judgment of

the United States Court of Appeals for the Fourth Circuit entered October 17, 1979 in the hope that such review will result in a direct order for refund or an addition of such order to the existing and otherwise favorable court decision, without which order for refund justice may never be possible for her under the specific circumstances of this case, the first one being personal and proper for mention here and now.

It is with deep regret and grief that the Petitioner states that, although all the laws and facts in the case are in her favor and the money in question is all that she has to show for a lifetime of hard work and investment and all that she has for a living and all other purposes now and hereafter, her eyes are in such a serious condition from stress, hardship, and lack of medical attention that she cannot see well enough to properly prepare this all-important petition and has no money with which to employ help or even pay for a living. Therefore she begs the Court to grant her petition without delay and if necessary to allow oral argument in order that she may say whatever she cannot write under the conditions now.

Opinions Below

The Opinion of the United States Tax Court holding that the notice of deficiency was not mailed to Petitioner's last-known address is printed in Appendix "C" at page 36. The Opinion of the United States Court of Appeals for the Fourth Circuit is printed in Appendix "B" at page 33.

Jurisdiction

The Judgment of the United States Tax Court entitled "Order of Dismissal for Lack of Jurisdiction," was entered July 18, 1978 and is printed in Appendix "D" at page 50. An Order denying Petitioner's Motion to Revise Decision was made August 24, 1978 and is printed in Appendix "E" at page 51. A Petition for Rehearing was denied October 17, 1979 and is printed in Appendix "A" at page

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(Stated in the United States Tax Court's Opinion filed July 17, 1978 and orders entered July 18, 1978 and August 24, 1978, as resulting from an invalid notice of deficiency.)

1. Can lack of jurisdiction bar the issuance of an Order for Refund of money seized from a taxpayer by the Commissioner of Internal Revenue to satisfy an alleged tax deficiency claim

where such seizure was in direct violation of that part of Section 6213(a) of the Internal Revenue Code specifically barring collection "if a petition has been filed in the Tax Court" and "until the decision of the Tax Court has become final";

where the sum total of the taxpayer's entire means and sustenance were craftily taken without her knowledge, without any substantiation, and at that particular time when her safety was legally assured under the sole protection of the United States Tax Court and official notification had been

made to litigants of a scheduled near-at-hand hearing before the Tax Court;

where such a taking precluded the Petitioner from full redress in the only Court created for the adjudication of such tax matters and especially bestowed with the right, the function, and the unmistakeable obligation to fully administer justice in the matter of tax deficiency claims submitted by petition regardless of whether any litigant stepped out of line in any way; and

where a taking under the conditions of this case constitutes total deprivation of the Petitioner's right to due process secured by Amendment V to the Constitution of the United States?

2. Did the Tax Court's judgment of non-jurisdiction due to a defective notice of deficiency, even though favorable to the Petitioner, actually administer justice to her in this case and to others who have cases growing out of unusual circumstances without encompassing in the Judgment an order

for refund where it was impossible for her to experience the usual benefit that flows from a beautiful and favorable decision ruling out any deficiency because the money involved had already been illegally seized, thereby depriving her of due process as to the money, the protection of the Tax Court and the proper recourse sought by her petition?

3. Can a taxpayer be forced to sue for a refund of money collected for undue taxes in lieu of being issued a check for same by a simple order for refund without further painful delay where seizure was made as a result of a series of violations of her rights to due process that took place throughout this case including every act committed against her during the long nightmare of want, suffering, strain, anxiety, illness, blindness and unhappiness briefly described in her tax case and extending through today?

4. Can the changing of the"Petition for Hearing in the United States Tax Court" to a "Motion to Dismiss for Lack of Jurisdiction" and the making of a decision in accord with the modified version, which change and decision usually turn out for the best in the greater number of cases, render justice in this and similar cases with obvious special circumstances and conditions that

prevent full justice to the Petitioner even when the most favorable decision possible within the limits of that practice?

5. Did the assignment of this case to the Small Claims Tax Court deny the Petitioner her right to due process of law where that Court was limited to claims of $1500 or less (7463c) while the instant claim representing all returns on her lifetime of work and investment until burial was $75,697.73 and the Court lacked generally the necessary jurisdiction for the establishing of justice in a case of this nature,

where decisions in that Court cannot be treated as precedents (7463b) and this case should establish some important precedents, where the Small Claims Court was without jurisdiction by statutory exception to determine claims not within the established limits (6214c),

where the Petitioner was denied her request for discontinuance of proceedings under the Small Claims Court at the beginning of the hearing of November 3, 1976 allowed by statute (Sec. 7463(d) IRC) and her motion of

November 13, 1976 for a hearing before the regular United States Tax Court rather than the Small Claims Division, and

where there was no possible relief for the Petitioner seeking judgment on her Petition for Hearing before the United States Tax Court filed in the Tax Court 18 days after receipt of information of the mailing of a deficiency notice and after full substantiation of her tremendous losses in 1970?

6. Can the decision of the United States Court of Appeals for the Fourth Circuit affirming lack of jurisdiction as the reason for non issuance of an order for refund stand undisturbed when such decision is not in agreement with the decision of other Circuit Court decisions?

7. Can refusal to issue an order for refund of money collected in violation of many laws be tolerated by this Court where that money taken represented the taxpayer's entire means for all purposes as well as sustenance until burial, which taking is within itself an act of inhumanity out of keeping with Internal Revenue practice which

attempts to leave enough for necessities to all those who actually are indebted for the deficiencies claimed?

8. Does the Court of Appeals' error in delaying action on Petitioner's inexpressibly urgent appeal for help as quickly as possible (The Statement on Merits of the Appeal of December 14, 1978 to the Court's decision of September 17, 1979 was 9 months and 3 days) render a quick order for refund appropriate and necessary in order that efforts may be made to seek recovery from the harm done during the delay?

9. Does the unchanging unerring Statute of Limitations guarantee the Petitioner's right to refund of her money by that Court before whom the issue was pending when the deed was committed, particularly since collection had been barred by the Statute of Limitations 2-1/2 years prior to the happening?

10. Can the Appellant be forced to petition a District Court or any Court that she feels is prejudicial when that Court has already dismissed a case on two occasions after reversal and remand by the Circuit Court of Appeals?

STATUTES INVOLVED

U. S. Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when an actual service entitled war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code, Section 6213(a)

> Within 90 days ... after the notice of deficiency authorized in section 6212 is mailed ... the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. ... No levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer ... nor if a

> petition has been filed with the Tax Court until the decision of the Tax Court has become final notwithstanding the provisions of 742(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper Court.

Internal Revenue Code, Section 6214(a)

> Except as provided by Section 7463 the Tax Court shall have jurisdiction to determine the correct amount of the deficiency. ....

Internal Revenue Code, Section 6501(a)

> The amount of any tax imposed by this title shall be assessed within three years after the return was filed ... and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

STATEMENT

This tax case has been a long nightmare of struggle in total darkness for the Petitioner most of the time. She heard in March 1976 that it had been in prgress about three years. A chance conversation informed her of a lien filed February 10, 1975 in Columbia, South Carolina, and later in March 1976 she found by inquiry that a lien was filed in Ft. Lauderdale, Florida, June 27, 1974.

The Petitioner had become very ill at the end of 1970 with extreme high blook pressure due to the confiscation of her main property and the persecution of herself and others necessitating a temporary move to Florida. She then developed anemia and in 1974 cancer for lack of all the things she had lost.

Although she was living in Florida, she was not aware of what the Commissioner was doing. It was all she could do robbed of her income to borrow a little for existence.

In 1973 she had received a bill from IRS and answered it immediately, supplied tax returns, and any other papers requested. She went to the office and phoned a number of times inquiring whether the matter was cleared up. She was told not to worry,

that everything seemed to be all right, and that she would probably hear no more. That was all she could ever find out, and nobody ever mentioned any deficiency or any lien.

When she heard of the tax lien she asked the agent to tell her please what it all meant. He said give him two days from March 9, 1976, and he'd find out. Then on March 11 he reported that the records were in Columbia, S. C. but that he could not get any information from Columbia, S. C. except that he was told a deficiency notice was mailed in 1973. She then tried to find out the truth in Columbia but was sidetracked by remarks that the records were in Florida. Petitioner was crushed but prayed for stength to contact the U. S. Tax Court somehow. Not being too brainy and still ill she struggled through the impossible task. On the second strike she made it and a little hope returned. She had tried to get a lawyer under the conditions but couldn't, both because of no money and fear of the case it appeared.

A hearing on motions of the parties in the above case was held November 3, 1976 before the Honorable Murray H. Falk in Columbia, S. C. during a trial calendar for small tax cases, and at the close of the

hearing upon request of the Respondent Judge Falk ordered briefs to be submitted to the Court.

Respondent requested dismissal of petitioner's motion for jurisdiction of the United States Tax Court on the ground that the petition was not filed within the 90 day period allowed by the Internal Revenue Code of 1954 § 6213 (a).

Petitioner's motion and petition sought the right to be heard before the United States Tax Court on the grounds that said petition was timely presented to the Tax Court, having been mailed 20 days after discovery through Revenue Agent Heisil March 11, 1976 of the alleged sending of a deficiency notice July 16, 1973, and offered proof that the notice of deficiency was not mailed to her last known address or in fact to any address she had ever had. Simultaneously with seeking jurisdiction and offering proof of timely appeal her petition and motion sought dismissal of the Commissioner's claim and refund of taxes in the amount of $75,695.73 collected by him September 7, 1976 without her knowledge while the matter was pending before the U. S. Tax Court and despite knowledge of

her loss of $3,449,030.97 for the year 1970.

Petitioner was granted a last extension of time until August 8, 1977 in which to file her reply brief.

The Tax Court gave her a favorable decision but a puzzling one. She fought so hard to get before the Tax Court and then won because she didn't. The Judges gave her excellent decisions but did not order refund of her money taken while before the Court.

REASONS FOR GRANTING WRIT

1. Certiorari should be granted to establish that an undue tax claim collected illegally by means of violations of constitutional rights and Internal Revenue Code laws without a valid deficiency notice and after filing of a petition in the Tax Court must be ordered refunded either by the United States Tax Court, which settles other tax deficiencies and under whose supervision the illegal collection occurred, by the Court of Appeals or by this Honorable Court or otherwise the Petitioner is robbed of everything while under the protection of the Court, which departure from the usual course of judicial proceedings calls for an exercise of this Court's jurisdiction.

The law serving as a ground for relief to this Appellant is quite clear in the provision that:

> No levy or proceeding in Court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, or until the expiration of such 90 day period or 150, as the case may be, nor if a petition has been filed with the Tax Court until the decision of the Tax Court has become final.

The purpose of the Tax Court stated in one decision was "to provide taxpayers with a means of obtaining a judicial determination of their tax liabilities without having to pay the deficiencies first...." Angelo Vitale v. Commissioner.

Although the money held by the Commissioner is all that this Appellant will get for her hard work and rich investments of many years, it will at this time pay a little on her debts created by the property thieves, will afford her a few of the necessities of life for awhile, and will repair one of her deliberately damaged buildings for rental income and residence. Without any money at all, she can't hold off the greedmongers nor exist 6 months without a miracle.

Therefore, Appellant prays that this Court order refund of the amount held by the Commissioner plus interest on same to date, in view of the tragic circumstances surrounding this case, the numerous violations of Internal Revenue Code Laws in the collection of same, and the complete denial of constitutional rights in so doing.

The most important ground for relief not considered in this case is the carrying out of the Tax Court's own function to decide each case on the basis of the facts of

that particular case and to dispose of it accordingly. That law establishes the criteria set forth in the case Daniel Lifter v. Commissioner, 59 TC 818, 821 (1973) is a possible guideline for the decision of this case. It is expressed thus:

> Each case will have to be decided on its own facts....

The facts in this case call for Tax Court jurisdiction.

Had the Court given proper consideration to the instant case according to the guidelines of the Lifter case, it would have cancelled speedily an already vitiated deficiency claim and would have made final and just disposition of the case by effecting refund of any money already illegally collected by any means. Certainly in this case the refund would be accomplished easier because the collection was made by means of arbitrary authority without substantiation and without the knowledge of the taxpayer.

The case of Michael O'Brien v. Commissioner, T.C. 543 (1974) further bears out the making of a decision on the basis of the facts for that particular case. The Court ruled that:

> Where notice of deficiency is found inadequate, the effect may be to vitiate the notice

> and any amount of tax related to it.

Vitiation of an invalid notice of deficiency would attach also to "any amount of tax related to it."

The unusual and distressing circumstances surrounding the instant case would require, according to the law established in the Lifter case, supra, concerning consideration of the facts of every case separately, much weighing and sifting of the underlying facts. Such consideration could result in only one course of action, the speedy cancellation of an already vitiated deficiency claim as a final, just disposition of the case under the jurisdiction of the Tax Court.

The ruling in the case of W. S. Trefry v. Commissioner, 10 BTA 134 (1928) established that where notice of deficiency is found inadequate both the notice and the tax are vitiated. Numerous refunds have been made after vitiation of assessments as well as deficiency notices without even being backed up by illegal collection during the time the petition was in the United States Tax Court.

There is no way possible for the Tax Court to abandon jurisdiction or to claim

non-jurisdiction until after full refund of the collection of a deficiency claim made while the Petition was in the United States Tax Court with a hearing already scheduled. The Tax Court failed to consider that the Commissioner's 2-way violation of § 6213 (a), the actual collection of an invalid deficiency claim and also the collection of such claim while the Petition was in the United States Tax Court with hearing scheduled, afforded perfect relief for this Appellant who would naturally look to the Tax Court for a ruling of "no deficiency due" and a refund of taxes collected when the Tax Court jurisdiction was made firmer by the Commissioner's serious offense against the Court.

The Tax Court failed to consider the relief contained in the Statute of Limitations, § 6501 (a). Its decision that the deficiency notice was invalid has exactly the same significance and weight as a decision to the effect that a deficiency is barred by the Statute of Limitations. In fact, the collection of the deficiency claim in this case was directly barred by the Statute of Limitations as a result of the invalid notice of deficiency (§ 6501 (a) of the Internal Revenue Code; § 6212 (b)(1) of the Internal Revenue Code; Morgan v.

Commissioner, 5 U.S. 15 TA1035-1039).

The case of Daniel Lifter, 59 TC 818, 821 (1973) established a specific ruling on the Statute of Limitations:

> Because no proper statutory notice was given within the 3 year statute of limitations assessment and collection of a deficiency for the year 1968 is barred.

This is a succinct statement of the Appellant's position in the instant case. In March 1976 when she received information of the deficiency notice, assessment and collection had already been barred by the Statute of Limitations for 2 years.

In the case of Walter Y. Morgan v. Commissioner, 5 U.S.B.T.A. 1035-1039, the Court said that on the date the second notice was sent to Jackson, Tennessee after the first notice had been missent to Jacksonville, Tennessee, the deficiency was barred by the Statute of Limitations and no assessment could be made for the year involved. The Court gave no consideration to the first invalid notice and said of the second notice,

> We are therefore of the opinion that there is no deficiency against this Petitioner for the calendar year of 1919.

The Court ruled in the case of W. S Trefry v. Commissioner, 10 BTA 134 (1928) that the deficiency notice was of no force and effect because barred by the Statute of Limitations. The Court's own words describe this case, like all the others named heretofore, to be like the instance one:

> Since the Statute of Limitations has run against the assessment and collection of the tax, there is no deficiency.

All of the Commissioner's procedures in this case violated Appellant's Constitutional rights, and nothing can prevent the relief afforded by the Constitution upon violation of said rights secured by it (Amendment V; Amendment XIV, 42 USC 1983; 42 USC 1985; 42 USC 1986; O'Brien v. Commissioner, 62 US Tax Reports 543 (1974).)

The Tax Court failed to consider the fact that, even though a just decision in favor of the Appellant as to the validity of the deficiency notice had been rendered and that usually such a decision nullified the invalid claim and led to a proper conclusion of the matter, such a happy solution could not follow in this case where the Commissioner illegally collected the invalid deficiency claim in September of 1976 while a Petition was in the Tax Court and a hearing scheduled for November 3, 1976.

The Tax Court incorrectly decided the facts invoking jurisdiction simultaneously with just disposition of the case, which facts were presented at the hearing of November 3, 1976 pursuant to Appellant's Motion of June 22, 1976 for Hearing and Cancellation of Alleged Deficiency, with full proof in support thereof as to circumstances, facts, and figures plus public information concerning eminent domain proceedings against her, all of which warranted immediate jurisdiction and decision in favor of Appellant in lieu of non-jurisdiction.

The Commissioner is holding an illegally collected claim without just reason, and that money he holds constitutes the only relief possible for the Appellant, who, due to the taking of her main property in 1970 and due to forced non-productivity and destruction of her remaining properties since 1970, is without income, business, rights, health, means of livelihood, money with which to repay any part of the debt incurred to hold her hard-earned properties made non-productive beyond her control, and without happiness, much less the rich benefits she deserves for a lifetime of hard work, investment, and services to people.

The Tax Court would have been forced to rule "no deficiency due" and a refund of money collected had it correctly decided the significance of the facts of a dangerous tax campaign carried on against her completely without her knowledge.

The Tax Court should have applied § 6215 (a) and § 7495(e) to this case. Section 6215 (a) states:

> If the taxpayer files a Petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be paid upon notice and demand from the Secretary. No part of the amount determined as a deficiency by the Secretary, but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in Court with or without assessment.

An invalid deficiency notice is a redetermination of the deficiency from the invalid claim to zero, has equal weight with assessment or collection barred by the Statute of Limitations, besides itself being barred by the Statute of Limitation long before the making of the decision.

In this case, the Tax Court nullified the deficiency notice thereby redetermining the tax to be zero as reduced from

$55,678.82 disallowed by the Tax Court. Section 6215 (a) demands that no amount determined by the Secretary and disallowed by the Tax Court shall be "collected by levy or proceeding in Court with or without assessment."

Had the Tax Court applied this law to the case and considered all the facts correctly, a ruling of "no deficiency due" would have resulted and a refund of the money collected would have been made without question. For the Tax Court not to apply this law to the case without any other encouraging chance for redress amounts to a miscarriage of justice which this Court can set right by a direct order to the Commissioner for refund or by remand to the Tax Court for the making of such an order.

The Commissioner's unlawful procedures against the Appellant and the Commissioner's denial of Appellant's Constitutional rights, some of which laws violated and Constitutional rights denied are:

Internal Revenue Sections:

6215 (a)
7459 (e)
60501(e)(1)(A)
6212 (b)(1)
6213 (a)
6501 (a)

Constitutional Rights:

Amendment V
Amendment XIV
42 U.S.C. 1983
42 U.S.C. 1985
42 U.S.C. 1986

2. Certiorari should be granted to decide whether or not justice can be administered by the application of the chosen practice of the United States Tax Court of changing a "Petition for Hearing" to a "Motion to Dismiss for Lack of Jurisdition" to every tax case, for admittedly it is very effective in many of them, or whether in other cases like the instant one (with very unusual conditions and circumstances like all the money involved being seized through violations of laws) great injustice is meted out to such taxpayer who reaps no benefit from a decision generally favorable and receives further injustice by forced separation from the protection of the Tax Court which in this particular case was reduced to naught with the changing of the Petition, thereby creating a very important question of Federal law that should be settled by this Court.

The Tax Court made a just decision in the main and the Appellant could in no wise complain of the fairness of it except for the last 10 words of the decision, "And the case is hereby dismissed for lack of jurisdiction," which were based on "Petitioner's Motion to Dismiss for lack of jurisdiction." Even though this reference to a Motion "for jurisdiction," as a motion "for lack of jurisdiction," is used it definitely could not apply to the circumstances in this case and to the fact that the Petitioner begged for jurisdiction in her petition, motion, hearing and brief because of the fraudulent taking of her property, her rights, her happiness, and her means of livelihood.

The Court of Appeals failed to consider some of the established laws of jurisdiction as important grounds for relief such as:

(a) Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the properties and the subject matter (Stoll v. Gottlieb, 305 U.S. 171; Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636, 637 C.A. 5, 1966).

(b) Every court has judicial power to hear and determine, or inquire into the question of its own jurisdiction, both

as to the parties and as to the subject matter (21 CJS ¶13).

(c) A court may determine the question of jurisdiction at any time in the proceedings of the cause, either before or after judgment (Williams v. Sherman, 212 P. 971, 36 Idaoh 494).

That being the purpose and the purpose of the instant case having been thwarted by the uncalled for and illegal collection by the Commissioner while the matter was in the hands of the Tax Court, that Court was duty-bound to extend jurisdiction until refund of a tax so collected could be effected.

The question of jurisdiction is "always open" and would certainly be expected to take care of any unusual or irregular action such as this illegal collection which action was at that time directly answerable to the Tax Court.

The Appellant does not know of any statute the Tax Court applied in denying jurisdiction prior to disposition of this case requiring "no deficiency due" and refund of the money. The Tax Court decision as to jurisdiction would have given justice and victory to the usual petitioner but in this case, the Commissioner had already

wrongfully taken the money, and there was even doubtful opportunity for redress.

There are Tax Court rulings both for and against this throwing off of jurisdiction, but in the absence of a controlling statute, disposition could have and should have been a part of the Tax Court's ruling. Many court rulings have found "no deficiency due" under far less conducive circumstances.

3. Certiorari should be granted because the Circuit Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the Circuit Court of Appeals for the Ninth Circuit in the case of O'Brien v. Commissioner, 62 TC 543 (1974), which first dismissed the appeal, then vacated its dismissal order, vacated the Tax Court order of dismissal, and remanded it to the Tax Court for reconsideration in the light of the case of Robinson v. Hanrahan, 409 U.S. 38 (1972) in which case the Supreme Court found that Robinson had not been accorded due process of law. It was the supremacy of the Constitution of the United States that finally rescued the rights it secured (O'Brien v. Commissioner, 62 TC 543; Robinson v. Hanrahan, 409 US 38 (1972).

4. The Circuit Court of Appeals had decided a federal question in a way in conflict with applicable decisions of this Court. The Appeals Court in the instant case did not properly consider the magnitude of the violations of the Petitioner's right to due process secured by the Constitution of the United States and failed to order refund in view of the violations.

When the decision of invalidity of the deficiency notice killed the action, the Statute of Limitations barred it also. Section 7459 (e) states that if the assessment or collection of any tax is barred by any statute of limitations, "there is no deficiency in respect of such tax." That ruling of "no deficiency" carries with it the necessity of a refund of tax already wrongfully collected in a case in which due process has been denied, as in the case of Robinson v. Hanrahan, 499 US 38 (1972), in which the Supreme Court found that Robinson had not been accorded due process of law.

CONCLUSION

Wherefore, for the foregoing reasons, the Petitioner prays that this Honorable Court, in view of the risk of extremely serious results by reason of delay in the relief sought in this action, order immediate refund of money erroneously collected by the Commissioner of Internal Revenue by invalid unsubstantiated notice when Petition was in the Tax Court and long after collection was barred by the Statute of Limitations, or grant further hearing in accordance with your schedule.

Respecfully submitted,

Annie Mary Timmons
3104 Monroe Street
Columbia, South Carolina 29205

January 14, 1980

Columbia, South Carolina.

Appendix A

FILED

OCT 17 1979

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1827

Annie Mary Timmons,

Appellant,

versus

Commissioner of Internal Revenue,

Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Phillips with the concurrence of Judge Haynsworth and Judge Winter.

For the Court

/s/ William K. Slate, II

CLERK

UNPUBLISHED

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1827

Annie Mary Timmons,

Appellant,

versus

Commissioner of Internal Revenue,

Appellee.

Appeal from the United States Tax Court, at Washington, D.C.
Howard A. Dawson, Jr., Judge, United States Tax Court.

Submitted July 6, 1979. Decided September 17, 1979

Before HAYNSWORTH, Chief Judge, and WINTER and PHILLIPS, Circuit Judges.

(Annie Mary Timmons, Appellant Pro Se. M. Carr Ferguson, Assistant Attorney General, Tax Division and Stuart E. Seigel, Chief Counsel, Internal Revenue Service, Attorneys for Appellee.)

Appendix B

PER CURIAM:

Annie Mary Timmons appeals a decision of the Tax Court dismissing her petition for redetermination of an income tax deficiency for 1970. In 1973, the Internal Revenue Service determined a deficiency of about $55,000 in Timmons' 1970 federal income tax, but the deficiency notice was not sent to the correct address. Indeed, the Commissioner concedes that the notice was improperly addressed and that Timmons did not in fact receive it. When the time for petitioning for a redetermination expired, the Commissioner proceeded to collect the assessment plus interest from a fund held by a court in South Carolina as a result of the condemnation of some property owned by the taxpayer.

The Tax Court dismissed taxpayer's redetermination petition for lack of jurisdiction. The case is complicated, however, by the fact that the want of jurisdiction can be placed on either of two grounds. To invest the Tax Court with jurisdiction of a redetermination petition, that petition must generally be filed within ninety days of the mailing of the deficiency notice. I.R.C. § 6213(a). The Tax Court also lacks jurisdiction of the original deficiency determination, however, unless the notice of deficiency is mailed to the correct address or unless a failure on that score is waived by the taxpayer. Id. §

Appendix B

6212(a), (b)(1). When notice is improperly sent and the petition is untimely, the practice of the Tax Court has been to place the dismissal on the former ground. E.g., Shelton v. Commissioner, 63 T.C. 193 (1974). That is what was done in this case. The Tax Court does have the minimal jurisdiction, however, to determine whether the notice was properly addressed. Id.

Timmons contends that the proper course for the Tax Court to have taken once it found that the notice was improperly sent was to determine that the deficiency was invalid, not to dismiss her petition. We disagree. The Tax Court lacked jurisdiction to make such a determination. Taxpayer is not without remedy, however. Since the tax has been collected, she may administratively seek a refund or, if that does not succeed, sue for a refund in either the appropriate district court or the Court of Claims. Cohen v. United States, 297 F.2d 760, 772 (9th Cir. 1962). In fact, she apparently has already begun that process. She also may return to the Tax Court by successfully obtaining a mandatory injunction compelling the Commissioner to issue a new notice of deficiency. Laing v. United States, 423 U.S. 161 (1976).

AFFIRMED.

T.C. Memo. 1978-262

UNITED STATES TAX COURT

ANNIE MARY TIMMONS, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2885-76. Filed July 17, 1978.

Annie Mary Timmons, pro se.

Albert L. Sandlin, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Judge: These motions to dismiss for lack of jurisdiction were assigned to and heard by Special Trial Judge Murray H. Falk. The Court agrees with and adopts his opinion which is set forth below.[1]

[1] Since this is a preliminary jurisdictional motion, the Court has concluded that the post-trial procedures of Rule 182, Tax Court Rules of Practice and Procedure, are not applicable in these particular circumstances. This conclusion is based on the authority of the "otherwise provided" language of that rule. The parties were heard on oral argument.

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SERVED JUL 17 1978

OPINION OF THE SPECIAL TRIAL JUDGE

FALK, Special Trial Judge: Respondent determined a deficiency of $55,678.32 in petitioner's 1970 federal income tax. The notice of deficiency was issued on July 16, 1973. On April 2, 1976, petitioner filed a petition for redetermination of the deficiency. Respondent filed a motion to dismiss for lack of jurisdiction on the ground that petitioner did not file her petition within the time prescribed by section 6213(a).[2] Petitioner filed a document in objection to respondent's motion, alleging that the notice of deficiency in issue was not mailed to her at her last known address. We have treated that document as petitioner's motion to dismiss for lack of jurisdiction on the ground that the notice of deficiency was not mailed to her last known address, as well as her opposition to respondent's motion.[3] The parties were heard on both motions. The sole question for decision is whether respondent properly mailed the notice of deficiency to petitioner's last known address.

[2] All section references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

[3] Petitioner, appearing pro se, has urged us to decide the substantive issues upon which the 1970 federal income tax deficiency was determined and to enter decision in her favor. As more fully discussed herein, we lack the jurisdiction to do so, regardless of who prevails on the question presented.

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FINDINGS OF FACT

At the time the petition herein was filed, petitioner resided in Columbia, South Carolina.

For most of 1970, petitioner resided at 1620 Laurel Street, Columbia, South Carolina (hereinafter referred to as the Laurel St. address). Near the end of 1970, petitioner moved to 205 S.E. 2nd Ave., Ft. Lauderdale, Florida (hereinafter referred to as the 2nd Ave. address). She did not file a change-of-address notification with the postal service nor did she notify respondent of her new address. While residing at the 2nd Ave. address, petitioner filed her 1970 federal income tax return with the Office of Internal Revenue at Columbia, South Carolina, reporting her address to be the Laurel St. address.

In March, 1972, petitioner moved from the 2nd Ave. address to 401 N.E. 3rd Ave., Ft. Lauderdale, Florida (hereinafter referred to as the 3rd Ave. address). Again, she did not file a forwarding address with the post office nor inform respondent of her new address. While residing at the 3rd Ave. address, petitioner filed her 1971 federal income tax return, on which she reported the 2nd Ave. address as her residence.

Petitioner's 1970 federal income tax return was assigned to Revenue Agent Ed Bowers for audit. On March 12, 1972, he

mailed a standard appointment letter to petitioner at 3104 Monroe St., Columbia, South Carolina (hereinafter referred to as the Monroe St. address). Bowers knew that the property at the Laurel St. address had been condemned. He claims to have obtained the Monroe St. address from the Columbia, South Carolina, telephone directory, but petitioner was not listed in the telephone directory as residing at that address. The Monroe St. address appeared, along with several others, on the depreciation schedule filed as part of petitioner's 1970 return.

The envelope containing Bowers' appointment letter was returned to respondent bearing the postal mark "Unknown." On that envelope, the Monroe St. address was scratched out and the following address (hereinafter referred to as the Magee address) was handwritten by a postal employee on the face of the envelope:

207 S.W. 7th St.
Magee, Miss. 29111

In addition, someone had written "Return to sender not at this address" and "opened by mistake" on the face of the envelope.

Unbeknownst to respondent, the post office had received a change-of-address notification on December 7, 1970, directing it to send all mail addressed to the Monroe St. address for the family of A.M. Timmons and Adolph N. Timmons to an address in Denver, Colorado. On May 19, 1971, the post office

received another change-of-address card directing the post office to forward all mail addressed to A. McLeod Timmons at the Monroe St. address to the Magee address. Adolph (or Adolphus) McLeod Timmons (A.M. Timmons) is petitioner's brother. He lived at the Monroe St. address prior to December, 1970, but petitioner had not lived there since 1946. She did not file those change-of-address cards with the post office. It was as the result of these change-of-address notifications that the appointment letter addressed to petitioner at the Monroe St. address was forwarded to the Magee address.

On August 7, 1972, Bowers mailed an appointment letter to petitioner at the 2nd Ave. address, which he obtained from her 1971 federal income tax return. This letter was returned unopened to respondent and bore the postal mark "Addressee unknown."

Bowers made further attempts to ascertain petitioner's current address. He contacted John McGrath, an attorney from Florida who had once represented petitioner in a condemnation proceeding, and who then had a suit pending against her in the Richland County (South Carolina) Court of Common Pleas for alleged nonpayment of legal fees. McGrath informed Bowers that petitioner was living with her sister, Mrs. Flora Plummer, in Magee, Mississippi. At the time of their conversation, McGrath no longer represented petitioner in any legal matter and their relationship was hostile.

On March 8, 1973, an audit examination report (30-day letter) was mailed to petitioner in care of Mrs. Flora H. Plummer, Magee, Miss. 39111. The 30-day letter was returned unopened to respondent on March 15, 1973. The envelope was marked "Refused" by the post office. On the face of the envelope, someone had written "Ret. to sender not at Magee address."

On July 16, 1973, the notice of deficiency in issue was sent by certified mail to petitioner addressed as follows:

Miss Annie M. Timmons
c/o Mrs. Flora H. Plummer
Magee, Mississippi 39111

A copy of the notice of deficiency was mailed to petitioner in care of Mr. John McGrath, 2591 Trapp Avenue, Coconut Grove, Florida 33133. Respondent determined that the Magee address was petitioner's last known address because: (1) The postal service forwarded the original appointment letter to the Magee address; (2) the handwriting on the returned envelopes containing the original appointment letter and the 30-day letter appeared to respondent's agent to resemble the handwriting on petitioner's 1970 federal income tax return; (3) Mr. McGrath believed petitioner lived in Magee, Mississippi; and (4) in the suit instituted by McGrath against petitioner for unpaid legal fees, the Richland County Court of Common Pleas

directed that service of process be made on petitioner by publication and by mailing a copy of the summons to petitioner at the Magee address. On July 20, 1973, the notice of deficiency was returned unopened to respondent with the postal mark "Moved. Left no address" on the face of the envelope.

On December 10, 1973, the Collection Division of the Internal Revenue Service at Chamblee, Georgia, mailed an assessment notice to petitioner at Box 978, Ft. Lauderdale, Florida 33302, which she received. She first became aware of the existence of the notice of deficiency sometime in 1976. On April 2, 1976, petitioner filed a petition with this Court for a redetermination of her tax liability. The envelope containing the petition bore a legible postmark dated March 31, 1976.

OPINION

This Court has no jurisdiction to redetermine a taxpayer's federal income tax deficiency unless a proper notice of deficiency has been mailed to the taxpayer in accordance with the provisions of law, unless the taxpayer receives actual notice that a notice of deficiency has been issued and files a timely petition. Shelton v. Commissioner, 63 T.C. 193, 197 (1974). Respondent contends that petitioner failed to file a petition with this Court within the time prescribed

by section 6213(a). Petitioner, on the other hand, contends that the notice of deficiency was not mailed to her addressed to her "last known address," as that term is used in section 6212(b)(1). Regardless of whether petitioner or respondent prevails, we lack jurisdiction to entertain this case on its merits. Nevertheless, we must decide on what ground the case is to be dismissed because different consequences flow from each determination. See Shelton v. Commissioner, supra; O'Brien v. Commissioner, 62 T.C. 543, 548 (1974).

If a notice of deficiency is properly mailed to the taxpayer at his or her last known address, the taxpayer has 90 days within which to file a petition with the Tax Court for a redetermination of the deficiency. Sec. 6213(a); sec. 6212(b)(1). This is so irrespective of whether the notice of deficiency is in fact received by the taxpayer. Lifter v. Commissioner, 59 T.C. 818 (1973). If, however, the notice of deficiency is not properly mailed to the taxpayer's last known address, it is not, as a general rule, deemed to be a valid notice and we are precluded from exercising our jurisdiction.[4] Shelton v. Commissioner, supra;

[4] We are not faced here with a situation where the taxpayer received actual notice of the issuance of a notice of deficiency in time to file a petition. Cf. O'Brien v. Commissioner, supra at 548-549; Lifter v. Commissioner, supra at 824.

Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367 (1974), affd. without opinion 538 F.2d 334 (9th Cir. 1976); DeWelles v. United States, 378 F.2d 37 (9th Cir.), cert. denied 389 U.S. 996 (1967); Haeberlin v. Commissioner, 34 T.C. 58 (1960). The purpose of this statutory scheme is to provide the taxpayer with notice of a deficiency determination and an opportunity to contest that deficiency in this Court before he or she is required to pay it.

A taxpayer's last known address is the address which, in the light of all relevant circumstances, the respondent reasonably believes the taxpayer wishes to have the respondent use in sending mail to him. O'Brien v. Commissioner, supra at 548; Lifter v. Commissioner, supra at 821. The relevant inquiry pertains to respondent's knowledge of the taxpayer's last known address; not what may in fact be his or her most current address in use. Alta Sierra Vista, Inc. v. Commissioner, supra at 374; Stewart v. Commissioner, 55 T.C. 238 (1970). Administrative realities demand that the burden rest upon the taxpayer to keep respondent informed of his or her proper address. Consequently, taxpayers generally act at their peril if they fail to furnish respondent with clear and concise notification of changes in address. Budlong v. Commissioner, 58 T.C. 850 (1972); McCormick v. Commissioner,

55 T.C. 138 (1970). While respondent must exercise due diligence in attempting to ascertain the taxpayer's correct address, he is entitled to use the address appearing on a taxpayer's return as the last known in the absence of such notification. Alta Sierra Vista, Inc. v. Commissioner, supra at 374; Lifter v. Commissioner, supra at 821; Clodfelter v. Commissioner, 57 T.C. 102 (1971), affd. 527 F.2d 754 (9th Cir. 1975), cert. denied 425 U.S. 979 (1976); Delman v. Commissioner, 384 F.2d 929 (3d Cir. 1967), affirming a Memorandum Opinion of this Court; Gregory v. United States, 57 F. Supp. 962, 102 Ct. Cl. 642 (1944), cert. denied 326 U.S. 747 (1945). Here, respondent clearly did not receive any notification from petitioner that all correspondence should be mailed to her at the Magee address. Consequently, we must decide whether respondent could reasonably believe that petitioner wanted him to mail the notice of deficiency to the Magee address, instead of the address appearing on her 1970 tax return (the Laurel St. address).

Respondent determined that petitioner could be reached at the Magee address because the Columbia, South Carolina, post office forwarded Bowers' initial appointment letter there. It is coincidental that petitioner and her brother have identical initials and unfortunate for respondent that the

post office forwarded the first appointment letter to the Magee address. However, petitioner never requested the post office to forward any of her mail to the Magee address and she cannot be held responsible for the error. See Estate of McKaig v. Commissioner, 51 T.C. 331, 336 (1968); Kennedy v. United States, 403 F. Supp. 619 (W.D. Mich. 1975), affd. without opinion 556 F.2d 581 (6th Cir. 1977). Furthermore, the appointment letter was returned to respondent indicating that petitioner was not at the Monroe St. address nor at the Magee address. More significantly, whether or not petitioner was actually at the Magee address, the return of the letter made it clear to respondent that she did not want respondent to mail correspondence to her at that address.

Both the appointment letter forwarded to petitioner at the Magee address and the 30-day letter addressed to petitioner at the Magee address were returned to respondent with handwriting on the face of the envelopes. Respondent believed that that handwriting was petitioner's and concluded that she lived at the Magee address. However, respondent never consulted a handwriting expert and none testified at the hearing. Surely, respondent's impressions as to the similarity of the handwriting on the returned envelopes and on petitioner's tax return are insufficient to justify a belief that petitioner resided at the Magee address. Respondent did not exercise due

diligence in ascertaining that the Magee address was petitioner's last known address on the basis of such speculative and unreliable information.

As a further indication that the Magee address was petitioner's last known address, respondent relies on the information furnished by McGrath and the order of the Richland County Court of Common Pleas directing a copy of the summons in the suit by McGrath to be sent to the Magee address. Respondent argues that petitioner received notice of this suit because, on July 17, 1973, Mr. E. Pickens Rish, an attorney in Lexington, South Carolina, filed a special appearance on behalf of petitioner. However, petitioner testified that she was informed of the proceedings by a friend who read the published notice, and this testimony has not been contradicted. Furthermore, respondent could not have known whether petitioner received the summons at the Magee address because her attorney did not file the special appearance until one day after the notice of deficiency was mailed. At the time the notice of deficiency was sent, respondent already knew that the Magee address was not reliable because the original appointment letter and the 30-day letter were returned. See Clodfelter v. Commissioner, supra; Kennedy v. United States, supra at 622.

A great deal of confusion was undoubtedly created by petitioner's constant moving and by her failure to inform respondent of a proper mailing address. However, petitioner never provided the Magee address to respondent and there is no probative evidence that any communication from him ever reached her there. Had respondent mailed the notice of deficiency to the Laurel St. address he would have been insured of its efficacy; petitioner would have had to accept the consequences of not clearly and concisely informing respondent of her proper address. Alta Sierra Vista, Inc. v. Commissioner, supra at 374.

Respondent did not properly mail the notice of deficiency, within the intendment of section 6212(b)(1), by sending a copy to petitioner in care of Mr. McGrath. Petitioner did not give a power of attorney to McGrath, nor had she ever given McGrath's address as her own. See, e.g. O'Brien v. Commissioner, supra; Berger v. Commissioner, 404 F.2d 668 (3d Cir. 1968), cert. denied 395 U.S. 905 (1969), affg. 48 T.C. 848 (1967). Further, respondent knew that McGrath no longer represented petitioner.

Throughout the hearing and in her pleadings and brief petitioner contended that this Court should grant her motion and hear the merits of the case and dismiss the deficiency.

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Petitioner misunderstands the law and the purpose of this hearing. This Court must have jurisdiction of a case before we can reach the substantive dispute between the taxpayer and the Commissioner of Internal Revenue. This requires satisfaction of the conditions discussed above. Secs. 6212 and 6213. Inasmuch as respondent has not satisfied the provisions of section 6212(b)(1), the case must be dismissed for lack of jurisdiction. Petitioner argues that the invalidity of the notice of deficiency only postpones the start of the 90-day period within which to file a Tax Court petition and that she filed a petition within 90 days of discovering that a notice of deficiency existed. However, the overwhelming weight of authority recognizes that the effect of a notice of deficiency is vitiated if it is not mailed to the taxpayer's last known address or it is not actually received by the taxpayer in time to file a timely petition with this Court. See Alta Sierra Vista, Inc. v. Commissioner, supra; Lifter v. Commissioner, supra, and the cases cited therein. Additionally, petitioner filed her petition 990 days after the notice of deficiency was mailed and approximately 2 1/2 years after she received the assessment notice from the Collection Division. We have found no case where the 90-day period within which to file a petition with this Court was extended in such circumstances.

An order dismissing this case for lack of jurisdiction will be entered.

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Appendix D

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ANNIE MARY TIMMONS, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 2885-76

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

Pursuant to the Memorandum Findings of Fact and Opinion (T.C. Memo. 1978-262) filed in this case on July 17, 1978, it is

ORDERED:

1. That respondent's motion to dismiss this case for lack of jurisdiction on the ground that the petition was not timely filed is denied.

2. That petitioner's motion to dismiss this case for lack of jurisdiction on the ground that the notice of deficiency was not mailed to her last known address is granted, and the case is hereby dismissed for lack of jurisdiction.

Howard A. Dawson, Jr.

Howard A. Dawson, Jr.
Judge

Entered: JUL 18 1978

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U.S. GOVERNMENT PRINTING OFFICE 19—[illegible]-6 Form 39 Rev. Apr. 1978

Appendix E

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

ANNIE MARY TIMMONS, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 2885-76

ORDER

On August 21, 1978, petitioner filed a "Motion to Revise Decision" which has been treated by the Court as a "Motion to Vacate Order of Dismissal." The Memorandum Findings of Fact and Opinion [T.C. Memo. 1978-262] filed herein on July 17, 1978, was followed by an Order of Dismissal for Lack of Jurisdiction entered on July 18, 1978. The basis for the dismissal was that respondent's notice of deficiency dated July 16, 1973, covering an income tax deficiency of $55,678.32 for the year 1970, was not mailed to petitioner's last known address as required by section 6212(b)(1) of the Internal Revenue Code. Our reasons for dismissing this case for lack of jurisdiction are fully set forth in that opinion.

Petitioner is seeking a revision of our order of dismissal to state that there is no deficiency due for the year 1970 on the ground that the assessment of any deficiency for that year is now barred by the statute of limitations. Since we lack jurisdiction to decide this case on the substantive merits of the previously determined deficiency, there is simply no way this Court can decide in this proceeding that there is "no deficiency due" from petitioner for 1970. Our jurisdiction is limited and restricted in these circumstances. However, the practical effect of our order of dismissal was to nullify or vitiate the notice of deficiency.

We note that, after the petition was filed in this case, respondent's agents collected the full amount of the determined deficiency plus interest (totaling $75,695.73) on September 7, 1976. Under the provisions

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U.S. GOVERNMENT PRINTING OFFICE 19—[illegible]-6 Form 39 Rev. Apr. 1978

of section 6511(a) of the Code and section 301.6511(a)-1, Regulations on Procedure and Administration, the petitioner has two years from the time the tax was paid, i.e., until September 6, 1978, to file a claim for refund on Form 1040X (Amended U.S. Individual Income Tax Return) with respect to the $75,695.73 previously collected by respondent. The claim for refund should be filed with the District Director of Internal Revenue whose office collected the tax and should refer to, or attach copies of, the Tax Court's Memorandum Findings of Fact and Opinion and the Order of Dismissal. If the District Director should disallow the claim for refund, a civil action under section 7422 of the Code to recover the refund cannot be instituted in the United States District Court unless a claim has been filed within the properly applicable period of limitation. Thus, it would appear that petitioner has an adequate remedy available to her to obtain the refund she seeks.

Accordingly, after due consideration of the motion, it is

ORDERED: That petitioner's motion to vacate and revise the Order of Dismissal for Lack of Jurisdiction is denied.

Howard A. Dawson, Jr.

Howard A. Dawson, Jr.
Judge

Dated: Washington, D.C.
August 24, 1978

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AFFIDAVIT OF SERVICE

In accordance with Rule 33 3(c) of the Rules of the Supreme Court of the United States I hereby certify that I have this 14th day of January 1980 filed the required copies of Petition for Writ of Certiorari in the Clerk's office and have mailed the required copies of the Petition to:

The Honorable M. Carr Ferguson
Assistant Attorney General of the
United States
Tax Division
United States Department of Justice
Washington, D. C. 20530

and

Chief Counsel
Internal Revenue Service
Washington, D. C. 20224

Annie Mary Timmons

Annie Mary Timmons

SWORN to and subscribed
before me this 14th day
of January 1980.

Rosemary T. Small (L.S.)
Notary Public State of South Carolina
My Commission expires: 8/31/87

Supreme Court, U. S.
FILED
MAR 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1196

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANNIE MARY TIMMONS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1196

ANNIE MARY TIMMONS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

We invite the Court's attention to the following facts which indicate that the petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on September 17, 1979 (Pet. App. 33), and an order of the court of appeals denying a petition for rehearing was entered on October 17, 1979 (Pet. 2; Pet. App. 32). No extension of time for filing of a petition for a writ of certiorari was obtained. The 90-day period specified by 28 U.S.C. 2101(c) for seeking certiorari in civil cases therefore expired on January 15, 1980. However, the petition for a writ of certiorari was not filed until January 17, 1980.

Since the time limit specified by 28 U.S.C. 2101(c) is jurisdictional, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

DOJ-1980-03

Supreme Court, U. S.
FILED
MAR 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1196

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

Annie Mary Timmons,
Petitioner

v.

Commissioner of Internal Revenue
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

Annie Mary Timmons
3104 Monroe Street
Columbia, SC 29205

Pro Se

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1979

Annie Mary Timmons,
Petitioner

v.

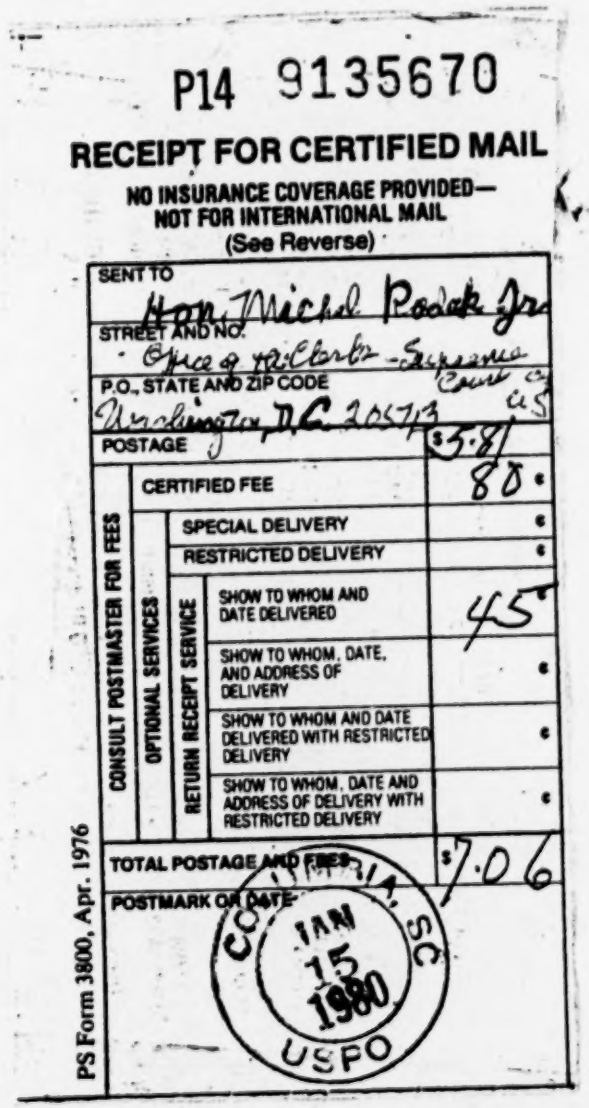
Commissioner of Internal Revenue
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

In reply to the Respondent's Memorandum (just received) indicating that the Petition for a Writ of Certiorari in the above case was filed out of time, the Petitioner states that due to circumstances beyond her control in the preparation of her Petition for mailing, the details of which she will not burden the Court unless necessary to substantiate the timely mailing, her Petition for a Writ of Certiorari was mailed on the 90th day allowed for submission of same, which fell on January 15, 1980.

The following receipt for certified mail #9135670 verifies this mailing.



P14 9135670

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO: Hon. Michael Rodak Jr.
STREET AND NO.: Office of the Clerk - Supreme Court of U.S.
P.O., STATE AND ZIP CODE: Washington, D.C. 20543
POSTAGE: $3.81
CERTIFIED FEE: 80¢
SPECIAL DELIVERY: ¢
RESTRICTED DELIVERY: ¢
RETURN RECEIPT SERVICE — SHOW TO WHOM AND DATE DELIVERED: 45¢
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY: ¢
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY: ¢
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY: ¢
OPTIONAL SERVICES
CONSULT POSTMASTER FOR FEES
TOTAL POSTAGE AND FEES: $4.06
POSTMARK OR DATE: COLUMBIA, SC JAN 15 1980 USPO
PS Form 3800, Apr. 1976

The Petitioner earnestly requests the Court's indulgence for this undesirable last-day mailing since it was occasioned by unforeseen and unavoidable circumstances which together with pro se representation are certainly deserving of the Court's forgiveness for seemingly last-minute activities.

However distasteful it might be, the mailing of her Petition for a Writ of Certiorari on the very last day allowed by law does fulfill the requirements of 28 U.S.C. 2101 (c) and is in accord with Rule 26 (c) of the Federal Rules of Appellate Procedure and therefore should not stand in the way of the issuance of a Writ of Certiorari for the settlement of the significant issues involved herein.

Respectfully submitted,

Annie Mary Timmons
3104 Monroe Street
Columbia, SC 29205

March 18, 1980